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SUPERIOR COURT OF CALIFORNIA
RIVERSIDE COUNTY

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

MAR 09 2000

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

REMITTITUR

JULIE GORCHYNSKI,
Plaintiff and Appellant,

v.

COUNTY OF RIVERSIDE et al.,
Defendants and Respondents.

E021615

(Super.Ct.No. 257606)

The County of Riverside ✓

I, STEPHEN M. KELLY, Clerk of the Court of Appeal, State of California, Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on December and this opinion or decision has now become final.

Respondents to recover costs on appeal.

Witness my hand and seal of the Court
this March 8, 2000.

Stephen M. Kelly, Clerk

By: Yolanda Burns
Deputy Clerk

cc: All parties (Copy of remittitur only, Rule 25(e), California Rules of Court).

MAILING LIST FOR CASE: E021615

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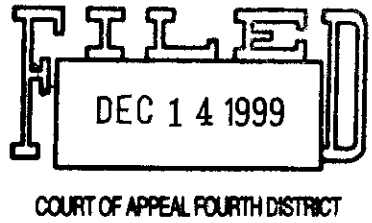
COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA



JULIE GORCHYNSKI, Plaintiff and Appellant, v. COUNTY OF RIVERSIDE et al., Defendants and Respondents.	E021615 and E021777 (Super.Ct.No. 257606) O P I N I O N

APPEAL from the Superior Court of Riverside County. Richard Van Frank, Judge. Affirmed.

Watkins & Stevens and Steven B. Stevens; Kussman & Whitehill, Russell S. Kussman, Steven G. Mehta and Tracy Smith for Plaintiff and Appellant.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Peter R. Osinoff, Douglas C. Smith and Raymond J. McMahon; Greines, Martin, Stein & Richland, Timothy T. Coates and Michael D. Fitts for Defendants and Respondents.

Plaintiff Julie Gorchynski (herein "Gorchynski") appeals after summary judgment was granted in favor of defendants County of Riverside, Riverside General Hospital

(herein collectively referred to as "Defendants"), and County of Riverside Coroner[1] in Gorchynski's action for dangerous condition of property.

PROCEDURAL BACKGROUND AND FACTS

On the evening of February 19, 1994, Gorchynski, an emergency medicine resident with Loma Linda University Medical Center, was on duty in the emergency room at Riverside County General Hospital (herein "Hospital"). Shortly after 8 p.m., Gorchynski and other emergency personnel were informed of the imminent arrival via ambulance of a patient with terminal cervical cancer who was reportedly in "ventricular tachycardia," a life-threatening form of cardiac arrhythmia. Upon arrival at the Hospital, the patient, Gloria Ramirez (herein "Ramirez"), received immediate attention from Gorchynski and approximately 10 other doctors, nurses and technicians.

Within 10 minutes after Ramirez's arrival, shortly after the first defibrillation to stabilize her heart rhythm, Gorchynski smelled an "ammonia-like" smell. A nurse, Susan Kane (herein "Kane"), was drawing Ramirez's blood from her hand when "[s]he said something to the effect like, 'Oh, my gosh. The ammonia smell is coming from her hand' where she was drawing the blood." Gorchynski never before had smelled anything like it at the Hospital.

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1 Gorchynski appealed from the trial court's granting of summary judgment in favor of the County of Riverside Coroner; however, it appears that she abandoned that appeal on November 12, 1998. Accordingly, this Court dismissed such appeal on November 20, 1998.

Kane started to pass out and Dr. Rey Ochoa (herein "Ochoa"), the emergency room head physician, moved to catch her. Before Kane had passed out, Gorchynski grabbed the syringe filled with Ramirez's blood from Kane, when she again smelled the ammonia-like odor. Gorchynski also took a deep whiff of the blood-filled syringe, after which the odor became more intense. Someone commented about small white crystal precipitate in Ramirez's blood sample.

In her deposition, Gorchynski testified that the ammonia-like smell was coming from the "toilet" at the foot of the gurney, at the bottom of which she remembers seeing a yellow liquid the color of a legal pad. The "toilet," or "hopper," refers to a large low sink at the left side of the gurney used to dispose of body fluids. According to Gorchynski, Ochoa flushed the liquid down, saying "I guess there is a lot of urine in the toilet." However, Ochoa had no recollection of a yellow-colored liquid in the hopper. Instead, he testified that he had "no reason to believe it wouldn't have just been clear water." Gorchynski became dizzy and excused herself to sit down. Later, she lost consciousness.

Other staff attending to Ramirez, but not all, began to feel ill. Ochoa, who was closest to the hopper but never felt any symptoms or smelled anything unusual, ordered the evacuation of the trauma room. Other staff members also became ill, even as Ochoa and other unaffected staff members continued to try to resuscitate Ramirez.

At approximately 8:47 p.m., the fire department had arrived, and at 8:50 p.m. Ochoa pronounced Ramirez dead. Within minutes, the City of Riverside HAZ MAT team arrived and other officials were notified of the situation. The HAZ MAT team

evacuated and closed the entire emergency room and the entire area. The Coroner was summoned to handle Ramirez's remains.

Those affected complained of dizziness, nausea, and headaches. Six people, including Gorchynski, were hospitalized at Parkview Hospital; some exhibited bradycardia (slow heartbeat), apnea (breathing trouble), and muscle spasms. Gorchynski's hospital records from Parkview Hospital the day after the incident note that any "obvious cause of poisoning episode is not to be found." "Due to [Gorchynski's] uncertain condition and puzzling etiology of cause of poisoning," Gorchynski was transferred to Loma Linda University Medical Center for follow up. Gorchynski's medical records from Loma Linda reflect that during her second day there she had an "apneic episode" (trouble breathing) and associated muscle spasms and bradycardia (slow heartbeat). On February 23, 1994, Gorchynski's treating physician, Dr. Reiner Bonnet, discontinued the "PAM" treatment because he "came to the conviction that she did not have organophosphate poisoning." According to her discharge report, "[t]hese muscle spasms and apneic episodes resolved spontaneously." At the end of her 12-day stay at Loma Linda, Gorchynski "complained of some knee pain with some numbness and tingling." After discharge, she was diagnosed with osteonecrosis in her knees, a condition describing the death of bone tissue.

The city HAZ MAT team entered the emergency room where Ramirez had been treated and tested it for hazardous gases. None were detected. Just past midnight, "decontamination" of the individuals in the emergency room took place and, after

consulting with the Coroner, the HAZ MAT team placed Ramirez's body in a double-sealed bag and airtight container for placement in the hospital morgue. The unit reopened by 7 a.m. the next morning.

Governmental agencies at all levels were summoned to investigate what had happened. At the local level, the Riverside County Coroner's Office investigated the cause of Ramirez's death and its possible connection to the incident. The Riverside County Department of Public Works also sought to determine the cause, as did a private engineering firm.

At the state level, the California Department of Health Services Division of Environmental and Occupational Disease Control (herein "DHS"), and the Licensing and Certification Division, commenced an independent investigation of the incident at the request of the County of Riverside Health Services Agency. The California Department of Industrial Relations, Division of Occupational Safety and Health (herein "Cal OSHA") also conducted an investigation.

At the federal level, scientists at the Lawrence Livermore National Laboratory Forensic Science Center, run by the University of California, conducted an extensive inquiry (herein "Livermore Lab"). The National Institute for Occupational Safety and Health was also consulted (herein "NIOSH"). Military researchers on biological weapons connected with the United States Air Force asked Gorchynski for a blood sample and a description of her symptoms; however, she turned down their request for a blood sample because she did not want to become a guinea pig.

Despite all these investigations, the answer to what scientists at Livermore Lab termed a "major medical mystery" remained elusive. According to the Coroner, the autopsy of Ramirez's body revealed that she "died as a result of . . . cardiac disrhythmia due to acute renal failure due to cervical carcinoma." Regarding the symptoms suffered by the hospital staff treating her, the Coroner noted that "[t]he exhaustive toxicological studies have not identified any external toxic substances which would have contributed to her death."

Examination of the hospital facility itself provided no evidence of the source of any toxic substance. According to DHS, "Investigations into the community hospital facilities were conducted by a number of agencies. The investigations included examinations of the heating, ventilation and air conditioning (HVAC) system, plumbing, and chemicals used in the ER. Agencies involved included the California Occupational Safety and Health Administration . . . , the City of Riverside Department of Public Works, the California Department of Health Services Licensing and Certification Division, and an independent mechanical engineering firm . . . . These investigations found no evidence that anything associated with the facility, including the HVAC system, plumbing fixtures, pesticide applications, or janitorial supplies, were responsible for the symptoms in the ER staff members."

Nonetheless, there were various theories and speculation as to what caused the incident at the hospital. The DHS opined that "[t]he data are most consistent with an outbreak of sociogenic illness [mass hysteria]. However, an alternate scenario in which

an exposure caused symptoms in a small number of staff members, with the remainder of symptomatic staff members reacting to the stressful situation, is also plausible." Scientists at Livermore Lab postulated that Ramirez's dying body, under a series of unique circumstances, could have produced in her blood a highly toxic metabolite known as dimethyl sulfate. Gorchynski alleges that the use of Dursban, a commonly used organophosphate pesticide, somewhere in the hospital four days before the incident was somehow responsible. She also blames the State of California's spraying of Riverside area with Malathion (a type of organophosphate) to control medflies, and a resulting coverup conspiracy, for the incident.

Gorchynski sued Defendants, among others, in July 1995, alleging that a dangerous condition on public property caused her injuries.[2] (Gov. Code, § 835.[3]) Defendants moved for summary judgment in December 1996, on the grounds that, despite an extensive multi-agency investigation, the bizarre events of February 19, 1994, remain unexplained. Defendants demonstrated that, after extensive discovery, Gorchynski could not offer any admissible, substantial evidence that Defendants' personnel knew or should have known of a dangerous condition at the Hospital that caused her injuries as section 835 requires.

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2 Specifically, she alleged causes of action for negligence, intentional spoliation of evidence, negligent spoliation of evidence, and conspiracy against Defendants.

3 All further statutory references are to the Government Code unless otherwise indicated.

In opposition, Gorchynski offered the speculation of a few experts who, without any supporting facts or scientific investigation or analysis, purported to identify what caused the incident, who was likely responsible for it, and that it likely caused Gorchynski's osteonecrosis. In response, Defendants argued that the experts' unsupported speculation did not amount to substantial evidence sufficient to create a triable issue of fact.

The trial court agreed with Defendants and granted summary judgment in their favor noting the lack of "evidence of what occurred supported by facts." This appeal followed.[4]

STANDARD OF REVIEW

Our review of the trial court's granting of a motion for summary judgment is guided by the provisions of Code of Civil Procedure, section 437c. Subdivision (c) of that section provides: "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences

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[4] However, on appeal, Gorchynski only challenges the summary judgment to the extent it defeated her negligence cause of action.

reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

Our review of the trial court's decision to grant the summary judgment motion is a de novo review. When reviewing an order granting summary judgment, we examine the facts presented to the trial court and independently determine their effect as a matter of law. (*Parsons* v. *Crown Disposal Co.* (1997) 15 Cal.4th 456, 464.)

Our review begins with the pleadings. "The pleadings define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact." (*Ferrari* v. *Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.)

Subdivision (o)(2) of the Code of Civil Procedure section 437c provides: "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

Although Code of Civil Procedure section 437c was substantially amended in 1992 and 1993, the initial burden of proof remains with the moving party. We agree with *Villa*

v. *McFerren* (1995) 35 Cal.App.4th 733: "Prior to the adoption of the 1992 amendments to section 437c, it was a well-established rule under the pre-January 1, 1993, versions of section 437c that unless the moving party meets its burden, summary judgment could not be ordered, even though the opposing party has not responded sufficiently or at all. Stated differently, in summary judgment litigation occurring prior to January 1, 1993, there was no obligation on the opposing party to show that a triable issue of material fact existed unless and until the moving party had met its burden. [Citations.] Nothing in the language of the 1992 adoption of section 437c, subdivision (n)(2) amendments abrogates this well-established summary judgment requirement that the initial burden rests with the moving party. In fact, the express statutory language places the burden on the moving defendant or cross-defendant. Furthermore, we have carefully reviewed the legislative committee reports prepared in connection with the 1992 amendments to section 437c and there is no evidence of any legislative intent to modify the initial burden of proof which is allocated to the moving party." (*Id.*, at pp. 743-744.)

The final step in our review, if the burden has shifted, is to determine if the filings in opposition raise a triable issue of material fact. If they do, the motion must be denied. If they do not, the motion must be granted. (*River Bank America* v. *Diller* (1995) 38 Cal.App.4th 1400, 1410-1411.)

THE PLEADINGS

"First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing

there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading." (*AARTS Productions, Inc.* v. *Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064.)

"[Gorchynski's] suit against [Defendants] is not an ordinary negligence case; it is an action under section 835. This is because a public entity is not liable for injuries except as provided by statute (§ 815) and because section 835 sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property. '[T]he intent of the [Tort Claims Act] is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances: immunity is waived only if the various requirements of the act are satisfied.' [Citation.]

"Section 835 declares that, '[e]xcept as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.'" (*Brown* v. *Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829.)

Here, Gorchynski alleged that she sustained personal injuries and other damages as a result of the negligent acts of Defendants which caused her to become exposed to hazardous conditions, including toxic and chemical agents, on February 19, 1994, while she was on duty as an emergency medicine doctor at the Hospital. The amended complaint alleged that Defendants failed to protect Gorchynski from becoming exposed to hazardous conditions, including toxic and chemical agents, and failed to maintain its premises in such a manner so as to prevent such exposure from occurring. It was further alleged that, as a result of these failures, Gorchynski was injured.

THE SUMMARY JUDGMENT MOTION

After identifying the issues framed by the pleadings, "we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor." (*AARTS Productions, Inc.* v. *Crocker National Bank, supra,* 179 Cal.App.3d 1061, 1064.)

On December 30, 1996, Defendants filed a motion for summary judgment. The motion was based on the contention that an element of plaintiff's causes of action was lacking because there was no dangerous condition on Defendants' property which caused Gorchynski's injuries. In support of the motion, Defendants submitted the reports of various agencies summoned to investigate what had happened on February 19, 1994, declarations from individuals who worked at the Hospital, and excerpts from various depositions. Defendants argued that "[p]laintiff simply cannot prove by 'substantial evidence' that her injury was caused by a dangerous condition created by or known to

employees of RGH, instead of by some other manner beyond the control of the County of Riverside."

DID DEFENDANTS PRESENT SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF THE LACK OF A DANGEROUS CONDITION ON DEFENDANTS' PROPERTY?

The evidence presented by Defendants was satisfactory to meet its burden of producing facts sufficient to show the lack of a dangerous condition on Defendants' property created by, or known to, Defendants. For example, it offered independent scientific reports that opined the source of any hazardous agent was Ramirez's body. According to DHS, the major symptoms of illness reported by the staff members working on the evening of February 19, 1994, occurred in those "who had worked within 2 feet of" Ramirez's body. Contrary to Gorchynski's allegations, DHS found "no convincing evidence that exposure to organophosphate pesticides was the cause of the outbreak." Instead, the data revealed "small amounts of an unusual nitrogen-containing compound in air samples taken from the vicinity of [Ramirez's] body . . . . As it was an amine, it may have had an ammonia-like smell."

The report from Lawrence Lab postulated that Ramirez's dying body, under a series of unique circumstances, could have produced in her blood a highly toxic metabolite known as dimethyl sulfate. In support of their theory, the scientist at Lawrence Lab referred to the fact that witnesses detected an ammonia odor, observed "white or manilla crystals" in Ramirez's blood, and compared the symptoms reported by

the staff members who became ill with symptoms attributed to dimethyl sulfate exposure. Ochoa, the physician who took over when Gorchynski became too ill, saw the crystals in Ramirez's blood. Regarding the yellow liquid allegedly seen in the hopper in the trauma room, Ochoa does not recall having seen any such liquid. Instead, he testified that he had "no reason to believe it wouldn't have just been clear water." Gorchynski detected an ammonia smell shortly after the emergency staff members began working on Ramirez. However, prior to February 19, 1994, Michael Robertson, Chief of Hospital Plant Operations, had "never learned of any complaints of an 'ammonia-like' odor in [the] Emergency Department."

Examination of the hospital facility itself provided no evidence of the source of any toxic substance. According to DHS, "Investigations into the community hospital facilities were conducted by a number of agencies. The investigations included examinations of the heating, ventilation and air conditioning (HVAC) system, plumbing, and chemicals used in the ER. Agencies involved included the California Occupational Safety and Health Administration . . . , the City of Riverside Department of Public Works, the California Department of Health Services Licensing and Certification Division, and an independent mechanical engineering firm . . . . These investigations found no evidence that anything associated with the facility, including the HVAC system, plumbing fixtures, pesticide applications, or janitorial supplies, were responsible for the symptoms in the ER staff members."

In this case, Defendant's evidence was clearly sufficient, if unrebutted, to support a trial court decision that there was no evidence that Gorchynski's injuries were caused by a dangerous condition created by, or known to, employees of the Hospital, instead of by some other manner beyond Defendants' control. Given the facts as set forth in the pleadings and motion papers filed below, one matter is undisputed, and controlling: the only time an ammonia-like odor was detected at the Hospital was on the evening of February 19, 1994, in the emergency room when Ramirez's body was present.

DID PLAINTIFF SATISFY HER BURDEN OF SHOWING THAT A TRIABLE ISSUE OF ONE OR MORE MATERIAL FACTS EXISTED?

Since Defendants met their burden of negating an essential element of Gorchynski's cause of action, the burden shifted to her to show that a triable issue of one or more material facts existed. Plaintiff therefore filed an opposition to Defendants' motion wherein she submitted a separate statement of material facts, excerpts from various witnesses' deposition transcripts, a memorandum from the California Department of Industrial Relations, declarations from various expert witnesses, and various other notes or safety manuals.

The opposition claimed that prior to February 19, 1994, the Hospital became a "dilapidated facility that was unsafe for its patients and its personnel" and "[t]he physical plant emitted recurrent clouds of toxic fumes, sickening people who visited or worked at the hospital." In support of this claim, Gorchynski cites to the various deposition

excerpts which demonstrate that prior to February 1994, a "sewer" or "feces" odor had been detected on various occasions in the Hospital. Only one patient testified to having smelled a "strong chemical" odor from his bathroom sink prior to February 19, 1994. However, in the report from the California Department of Industrial Relations, it was noted that "supporting documentation [shows] that the plumbing system for the [emergency room] is on a circuit isolated and independent from the remainder of the hospital and a drainage problem in the main hospital would not affect the ED."

Gorchynski offered the declarations of various experts who inspected the Hospital and reviewed the various deposition transcripts and reports prepared by other scientists. One expert opined that "air contaminants that were present in the emergency room at the time of the treatment of . . . Ramirez did emanate from a physical source at the facility and that in the absence of negligence this would not be expected." Another believed that the "Hospital was on notice that the Emergency Room . . . was chronically in a dangerous condition; and that such dangerous condition was, in essence, an accident waiting to happen." However, Gorchynski was unable to identify the alleged dangerous condition or provide evidence to show that it was created by Defendants. Instead, her claim that she was exposed to organophosphate fumes in the emergency room was refuted by her own treating physician's deposition testimony that "she did not have organophosphate poisoning."

Recognizing her lack of evidence of causation, Gorchynski argued that the doctrine of *res ipsa loquitur* fills in the factual void and satisfies the requirements of

liability under subdivision (a) of section 835. "The res ipsa loquitur presumption, under California law, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant. . . .' [Citation.]" (*Brown* v. *Poway Unified School Dist.*, *supra*, 4 Cal.4th 820, 832.) However, under this doctrine, liability on public entities is imposed only in a narrow set of circumstances. Specifically, imposition of liability requires a finding that "an employee of the public entity ha[s] 'created' the dangerous condition. [Citation.]" (*Id.*, at p. 833.) "In cases such as these, a public employee's involvement in creating the dangerous condition provides a basis for presuming that the public entity has notice of the condition." (*Id.*, at p. 837, fn. omitted.)

Here, Gorchynski argued that "medical personnel do not ordinarily become exposed to toxic substances and become ill while in the hospital's own emergency room in the absence of negligence." Further, she presented expert testimony from an emergency room physician and administrator who opined that "incidents such as occurred in the Emergency Department on the night of February 19, 1994, do not ordinarily occur in the absence of negligence."[5]

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[5] In her opening brief, Gorchynski requests, pursuant to Evidence Code section 452, subdivision (d), that we take judicial notice of excerpts from the deposition of Chantae Williams, a paramedic who brought Ramirez into the emergency department on February 19, 1994. According to Williams, the "hopper" in the emergency room where she brought Ramirez was clear. In response, Defendants argue that plaintiff's failure to present this evidence to the trial court in opposition to their motion for summary judgment precludes this Court from considering it on appeal. (*Kim* v. *Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) We agree with Defendants. When reviewing a trial court's decision to grant summary judgment, we are limited to the facts shown in the

[footnote continued on next page]

However, the undisputed facts fail to support plaintiff's reliance on the doctrine of res ipsa loquitur. For example, testing in the emergency room failed to reveal the presence of any organophosphate. An inspection of the "toilet" or "hopper" in the emergency room where Ramirez was treated failed to reveal any contamination or back-flow. Gorchynski's physician ruled out organophosphate poisoning as the cause of her symptoms. Prior to February 19, 1994, there had been no complaints of any ammonia-like odors, only "sewer" or "feces" smells. The witnesses' testimony and observations, coupled with various state and national agencies' investigative reports, point to Ramirez's body as the source of the contamination, with the most plausible theory being dimethyl sulfate exposure.

Given Gorchynski's opposition, we find that she failed to present facts sufficient to establish the existence of a dangerous condition on Defendants' property created by, or known to, Defendants. Accordingly, we conclude that the trial court properly granted summary judgment in favor of Defendants.

[footnote continued from previous page]
documents actually presented to the trial court. (*Ibid.*; *United Community Church* v. *Garcin* (1991) 231 Cal.App.3d 327, 337.)

Nonetheless, Gorchynski argues that because she requests judicial notice of evidence in a companion case to this one, and because the same trial judge was aware of the evidence in the companion case, we should grant her request. Assuming, without deciding, that we accept Gorchynski's argument and grant her request, we find the additional testimony would not change our findings and conclusions in this case.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION

HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

GAUT
J.